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Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

LYNN ALLEN JOHNSON, an individual,

Plaintiff,

vs.

USANA HEALTH SCIENCES, INC., a Utah corporation; USANA, INC., a Utah corporation; USANA ACQUISITION CORP., a Utah corporation; USANA SENSE COMPANY, INC., a Utah corporation

Defendants.

**DECLARATION OF NICOLE M.
DEFORGE IN SUPPORT OF
DEFENDANTS' SECOND MOTION FOR
SANCTIONS UNDER FRCP 11**

Case No. 2:17-cv-00652-RJS-BCW

Judge Robert J. Shelby
Magistrate Judge Brooke C. Wells

-
1. I, Nicole M. Deforge, being at least 21 years of age and of sound mind and capacity, make this declaration in support of Defendants' Second Motion for Sanctions under FRCP 11.
 2. This declaration is based upon my personal knowledge of the facts set forth herein.

3. I am a resident of Salt Lake County, Utah.
4. I am litigation counsel for Defendants in the above-captioned proceeding.
5. On March 21, 2018, I sent to Plaintiff's counsel a meet-and-confer letter

regarding her Motion for Leave to File Amended Complaint, a true and correct copy of which is attached hereto as **Exhibit A**.

6. On March 22, 2018, Plaintiff's counsel emailed me in response to my letter. A true and correct copy of Plaintiff's counsel's email to me is attached hereto as **Exhibit B**.

7. In response to Plaintiff's Amended Motion for Leave to File an Amended Complaint, I repeatedly reached out to Plaintiff's counsel to meet-and-confer in hopes that Plaintiff would agree to withdraw the fraud claims and save the parties from the significant time and expense that would be necessitated in briefing and arguing the same issues again for the Court.

8. Attached as **Exhibit C** is a true and cored copy of my email exchange with Plaintiff's counsel between May 25 and June 4, 2018.

9. On June 13, 2018, I sent to Plaintiff's counsel a meet-and-confer letter regarding the Second Amended Motion for Leave to File Amended Complaint, a true and correct copy of which is attached hereto as **Exhibit D**.

I declare under criminal penalty of perjury of the State of Utah and the United States of America that the foregoing is true and correct.

DATED this 14th day of September, 2018.

/s/ Nicole M. Deforge
Nicole M. Deforge

EXHIBIT A

FabianVanCott

NICOLE M. DEFORGE
DIRECT 801.531-8900
ndeforge@fabianvancott.com

March 21, 2018

VIA EMAIL (jcolvin@lwsllaw.com)

James W. Colvin III

Re: Johnson v. USANA Health Sciences Inc., et al.

Dear James:

I am writing with respect to your Motion for Leave to File Amended Complaint, which was filed on March 12, 2018 ("Motion"). Upon careful review of the proposed amendment, we believe that the fraud claims as alleged are still not viable and that the breach of contract claim will not survive as to most of the Defendants for the same reasons set forth in Defendants' Motion to Dismiss and as briefly discussed below. However, rather than spend our respective clients time and money briefing the issues again, we would like to explore possible options for moving forward.

Regarding the breach of contract claims, enclosed is a copy of what we believe to be the application submitted by Ms. Johnson to become a USANA distributor. Assuming for purposes of argument that this document constitutes a contract with Ms. Johnson, USANA, Inc. would have been the contracting party as reflected therein. As demonstrated in Defendants' Motion to Dismiss, USANA, Inc. became USANA Health Sciences, Inc. in 2000, and USANA, Inc. has merely functioned as a dba of USANA Health Sciences since that time. The other USANA entities named as defendants in the lawsuit were not even formed at the time the contract was allegedly entered into and therefore could not have been parties to such a contract. Consequently, we do not believe that those entities are proper defendants as to the breach of contract claims.

Regarding the fraud claims, we believe that your proposed amended complaint still fails to state a viable claim against any of the Defendants. First, the claim is barred by the statute of limitations. Although there are allegations of fraudulent concealment as a basis for tolling the statute of limitations, there are no allegations of anything purportedly concealed by Defendants that could have prevented discovery of a claim. Concealment of the motive for termination Ms. Johnson's distributorship does not meet any of the elements of fraudulent concealment such as would toll the statute of limitations. Ms. Johnson knew all of the material facts of her claim more than three years ago.

Second, as alluded to by the judge in his ruling, the economic loss rule likely bars this claim. Given the alleged contract between the parties and the lack of any allegation of physical

ATTORNEYS AT LAW

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Page 2

property damage or bodily injury, the fraud claims would be precluded under the economic loss rule.

Third, the elements of fraud have not been alleged at all, much less with the particularity required by Rule 9. The elements of fraud are as follows:

(1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage.

Fid. Nat. Title Ins. Co. v. Worthington, 2015 UT App 19, ¶ 10, 344 P.3d 156, 159. Nowhere in the proposed amended complaint are these essential elements of fraud alleged, including that the Defendants made any representations to Johnson for the purpose of inducing her to act or that she acted in reliance upon such representations.

However, as mentioned above, rather than spend our respective client's time and money briefing these issues for the Court, we would propose the following alternatives:

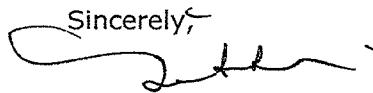
1. If you would agree to drop the fraud claim and withdraw your pending Motion, we would be willing to stipulate to the filing of an amended complaint for breach of contract only as against USANA Health Sciences, Inc. dba USANA, Inc. (dropping the other defendants); or
2. If you believe that you can still assert a viable fraud claim in light of the discussion above, we are willing to allow you to withdraw your Motion and attempt to resolve the flaws with the fraud claim, provided that you limit your client's breach of contract claim to only USANA Health Sciences, Inc. dba USANA, Inc.

Please be advised that if Defendants are forced to incur substantial fees to brief these issues yet again in connection with the pending Motion, our clients may seek an award of their fees and costs from the Court.

Given that our response to your Motion is currently due on Monday, April 2, this offer will remain open until March 23, 2018 in order to ensure that we have sufficient time to brief the Motion as needed. However, if you need additional time to consider, we would be willing to extend the offer deadline provided that the deadline to respond to the Motion is extended as well.

March 21, 2018
Page 3

Please feel free to contact me directly if you wish to discuss this matter further.

Sincerely,


Nicole M. Deforge

cc: Gregory M. Saylin

EXHIBIT B

Nicole Deforge

From: James Colvin <jcolvin@lwsl-law.com>
Sent: Thursday, March 22, 2018 1:46 PM
To: Nicole Deforge
Cc: James Colvin
Subject: Re: Johnson v. USANA

Nikki,

I am agreeable to this. I understand your position but, given your position, I believe that I do still have a fraud claim and must assert one. As such, I am agreeable to option 2 in your letter and look forward as to how we would proceed in that regard. Let me know. Thanks.

JLC

James L. Colvin, III

918-970-2031
jcolvin@lwsl-law.com<mailto:jcolvin@lwsl-law.com>
From: Nicole Deforge <nndeforge@fabianvancott.com>
Date: Wednesday, March 21, 2018 at 7:26 PM
To: James Colvin <jcolvin@lwsl-law.com>
Subject: RE: Johnson v. USANA

Thanks again for the extension. Attached for your review and approval are a stipulated motion and order for the extension. Please let me know if I have your approval to file.

Nikki

Nicole M. Deforge
Attorney
FabianVanCott
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Phone: 801.574.2620<tel:801.574.2620>
nndeforge@fabianvancott.com<mailto:nndeforge@fabianvancott.com>
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From: James Colvin <jcolvin@lwsl-law.com>
Sent: Wednesday, March 21, 2018 9:32 AM
To: Nicole Deforge <nndeforge@fabianvancott.com>
Cc: James Colvin <jcolvin@lwsl-law.com>
Subject: RE: Johnson v. USANA

Thanks. If I wasn't clear, I'm okay with the additional week.

JLC

James L. Colvin, III

918-970-2031

jcolvin@lwsllaw.com<mailto:jcolvin@lwsllaw.com>

From: Nicole Deforge [mailto:nedeforge@fabianvancott.com]

Sent: Wednesday, March 21, 2018 10:30 AM

To: James Colvin

Subject: RE: Johnson v. USANA

Sure. We'd like to explore ways that we might be able to stipulate to an amended complaint at least with respect to some claims rather than spending money fighting over the motion. I'm still working out the details of that with the client though so can't promise anything at this point.

Nicole M. Deforge

Attorney

FabianVanCott

215 South State Street, Suite 1200

Salt Lake City, UT 84111-2323

Phone: 801.574.2620<tel:801.574.2620>

nedeforge@fabianvancott.com<mailto:nedeforge@fabianvancott.com>

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From: James Colvin <jcolvin@lwsllaw.com<mailto:jcolvin@lwsllaw.com>>

Sent: Wednesday, March 21, 2018 9:26 AM

To: Nicole Deforge <nedeforge@fabianvancott.com<mailto:nedeforge@fabianvancott.com>>

Cc: James Colvin <jcolvin@lwsllaw.com<mailto:jcolvin@lwsllaw.com>>

Subject: RE: Johnson v. USANA

Good Morning Nikki,

I'm always agreeable to giving more time. Could you be a little more specific on other options? Thanks.

James L. Colvin, III

918-970-2031

jcolvin@lwsllaw.com<mailto:jcolvin@lwsllaw.com>

From: Nicole Deforge [mailto:nedeforge@fabianvancott.com]

Sent: Wednesday, March 21, 2018 9:59 AM

To: James Colvin

Subject: RE: Johnson v. USANA

Hi James. I'm in the process of writing up a proposal for resolving your pending motion. Our deadline to respond is on Monday, so I'm wondering if you would be willing to grant us a one-week extension to respond while we explore other options.

Thanks.

Nikki

Nicole M. Deforge

Attorney

FabianVanCott

215 South State Street, Suite 1200

Salt Lake City, UT 84111-2323

Phone: 801.574.2620<tel:801.574.2620>

ndeforge@fabianvancott.com<mailto:ndeforge@fabianvancott.com>

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From: James Colvin <jcolvin@lwsl-law.com<mailto:jcolvin@lwsl-law.com>>

Sent: Friday, March 2, 2018 1:50 PM

To: Nicole Deforge <ndeforge@fabianvancott.com<mailto:ndeforge@fabianvancott.com>>

Cc: Greg Saylin <gsaylin@fabianvancott.com<mailto:gsaylin@fabianvancott.com>>; James Colvin <jcolvin@lwsl-law.com<mailto:jcolvin@lwsl-law.com>>

Subject: RE: Johnson v. USANA

Hi Nikki,

You may sign for me. Have a good weekend.

JLC

James L. Colvin, III

918-970-2031

jcolvin@lwsl-law.com<mailto:jcolvin@lwsl-law.com>

From: Nicole Deforge [mailto:ndeforge@fabianvancott.com]

Sent: Friday, March 02, 2018 11:51 AM

To: James Colvin

Cc: Greg Saylin

Subject: RE: Johnson v. USANA

Hi James. Attached for your review is a stipulation and order for an extension to respond to the complaint. Please let me know if I have your permission to affix your signature and file with the court.

Thanks.

Nikki

Nicole M. Deforge
Attorney
FabianVanCott
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Phone: 801.574.2620<tel:801.574.2620>
ndeforge@fabianvancott.com<mailto:ndeforge@fabianvancott.com>
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-----Original Message-----

From: James Colvin <jcolvin@lwsllaw.com<mailto:jcolvin@lwsllaw.com>>
Sent: Wednesday, February 21, 2018 9:38 PM
To: Nicole Deforge <ndeforge@fabianvancott.com<mailto:ndeforge@fabianvancott.com>>
Cc: Gregory M. Saylin <gsaylin@fabianvancott.com<mailto:gsaylin@fabianvancott.com>>
Subject: Re: Johnson v. USANA

No objection.

James Colvin

On Feb 21, 2018, at 10:07 PM, Nicole Deforge <ndeforge@fabianvancott.com<mailto:ndeforge@fabianvancott.com>><mailto:ndeforge@fabianvancott.com%3cmailto:ndeforge@fabianvancott.com>>> wrote:

Hi James. Based on the Court's ruling, it is our understanding that we do not need to file an answer to the remaining breach of contract claim until the deadline passes for you to file a motion for leave to amend. Or, if you do file a motion, then we would file an answer pursuant to the rules depending on the disposition of the motion. However, to be on the safe side, we would like to request an extension of time to file an answer until that time. Please let me know if that is acceptable.

Thanks.

Nikki

Nicole M. Deforge

Attorney

FabianVanCott

215 South State Street, Suite 1200

Salt Lake City, UT 84111-2323

Phone: 801.574.2620<tel:801.574.2620>

ndeforge@fabianvancott.com<mailto:ndeforge@fabianvancott.com<mailto:ndeforge@fabianvancott.com%3cmailto:ndeforge@fabianvancott.com>>

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EXHIBIT C

Nicole Deforge

From: Nicole Deforge
Sent: Monday, June 4, 2018 8:57 AM
To: 'James Colvin'
Cc: Greg Saylin; Audrey Olson
Subject: RE: Johnson v. USANA

James,

We did not receive a letter from you last week setting forth the basis for your proposed amendment to the fraud claims, as requested. I assume that this means you no longer wish to seek leave to amend your fraud claims. Please let me know if you intend to withdraw your fraud claims. If not, then we will plan to file our opposition to your pending motion by Friday along with our Rule 11 motion.

Thanks.

Nikki

NICOLE M. DEFORGE
Attorney
FabianVanCott
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Phone: 801.574.2620
nedeforge@fabianvancott.com
www.fabianvancott.com

-----Original Message-----

From: James Colvin <jcolvin@lwsl-law.com>
Sent: Tuesday, May 29, 2018 5:10 PM
To: Nicole Deforge <nedeforge@fabianvancott.com>
Cc: Greg Saylin <gsaylin@fabianvancott.com>; Audrey Olson <aolson@fabianvancott.com>
Subject: Re: Johnson v. USANA

This is fine with me.

James L. Colvin, III

On May 29, 2018, at 3:46 PM, Nicole Deforge <nedeforge@fabianvancott.com<mailto:nedeforge@fabianvancott.com>> wrote:

James, I just noticed that I failed to include the extended deadline in the second paragraph below. I believe that we agreed to an extension until this Friday but should probably extend a bit longer while we work through these latest issues. Would you be willing to extend the response deadline until the following Friday, June 8? I'm attaching a proposed stipulation and order to that effect for your review, if acceptable. We would also agree to hold off on filing the Rule 11 motion until then as well.

Please let me know at your earliest convenience. Thanks.

Nikki

Nicole M. Deforge
Attorney
FabianVanCott
215 South State Street, Suite 1200
Salt Lake City, UT 84111-2323
Phone: 801.574.2620<tel:801.574.2620>
nedeforge@fabianvancott.com<mailto:nedeforge@fabianvancott.com>
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nedeforge@fabianvancott.com<mailto:nedeforge@fabianvancott.com>

From: Nicole Deforge
Sent: Friday, May 25, 2018 5:26 PM
To: James Colvin <jcolvin@lwsllaw.com<mailto:jcolvin@lwsllaw.com>>
Cc: Greg Saylin <gsaylin@fabianvancott.com<mailto:gsaylin@fabianvancott.com>>; Audrey Olson <aolson@fabianvancott.com<mailto:aolson@fabianvancott.com>>
Subject: Johnson v. USANA

Dear James,

I am writing to follow-up on our phone conversation concerning the fraud claim and the Rule 11 motion.

First, we agreed to extend the deadline for USANA to respond to your pending Amended Motion for Leave to Amend. Although not specifically discussed, we will also hold off on filing our Rule 11 motion until then.

Second, you inquired about the possibility of filing a second amended motion for leave to amend, presumably to correct the deficiencies in the fraud claim as detailed in our Rule 11 motion. Our concern is that, as discussed, it is not possible to correct the deficiencies and that if there were actual facts to support the claim they would have been alleged previously. However, in order for us to be able to fully evaluate your request, would you please provide a letter by next Wednesday detailing the corrections you believe you can make to the fraud claim if you were allowed to file yet another motion for leave to amend?

Thanks and have a nice weekend.

Nikki

Nicole M. Deforge
Attorney
FabianVanCott
215 South State Street, Suite 1200
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nedeforge@fabianvancott.com<mailto:nedeforge@fabianvancott.com>

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<USANA-JOHNSON May 29 Stipulated Motion for Extension of Time to Respond to Amended Motion for Leave.docx>
<USANA-JOHNSON May 29 Proposed Order Granting Stipulated Motion.docx>

EXHIBIT D

FabianVanCott

NICOLE M. DEFORGE
DIRECT 801.531-8900
ndeforge@fabianvancott.com

June 13, 2018

VIA EMAIL (jcolvin@lwsllaw.com)

James W. Colvin III

Re: Johnson v. USANA Health Sciences Inc.

Dear James:

I am writing with respect to the Amended Motion for Leave to File Amended Complaint [Doc 46] that you filed this morning at 2:05 a.m. As you know, today is our deadline to respond to your Amended Motion for Leave to File Amended Complaint [Doc 35], which was filed on April 13, 2018. We have already fully briefed the original Amended Motion and are in the process of filing our Opposition this morning.

Prior to undertaking the briefing of your original Amended Motion, we repeatedly requested that you withdraw the motion given the futility and fatal deficiencies of the fraud claims you sought leave to amend. We also repeatedly warned that our clients would incur substantial fees if you refused to do so and we were forced to brief the Amended Motion. In response to your request for leave to withdraw that Amended Motion and refile a third version, we requested that you submit a letter detailing the changes you intended to make that you believed would salvage your fraud claims by last Wednesday. The reason for doing so was to avoid the costs of briefing your original Amended Motion while giving sufficient time for us to do so in the event that the proposed changes proved insufficient. You never provided the letter and never informed us that you intended to file yet another version of your Amended Motion mere hours before our response was due without seeking leave of the Court to do so.

Although we are loathe to attribute improper motives to opposing counsel, this latest turn of events seems designed to maximize the costs to our client to the greatest extent possible. Regardless, the costs to our client could not have been greater had that been your intention. We have bent over backwards trying to avoid needless expenses for all parties and have reached out to you on numerous occasions with that sole purpose in mind. Unfortunately, our efforts appear to have been in vain.

As for your newly filed Amended Motion for Leave to File Amended Complaint [Doc 46], that filing was clearly improper as it was filed without leave of Court and on the very day that our response was due. We therefore demand that you immediately withdraw that motion to avoid the needless incurrence of further attorneys' fees by our client. Should you

ATTORNEYS AT LAW

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fail to do so, we intend to file a motion to strike and seek sanctions in the form of an award of the attorneys' fees incurred in connection therewith.

Sincerely,



Nicole M. Deforge

cc: Gregory M. Saylin